UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENERAL MOTORS LLC,
GENERAL MOTORS COMPANY,

Plaintiffs,

HONORABLE PAUL D. BORMAN

v. **No. 19-13429**

FCA US LLC, FIAT CHRYSLER AUTOMOBILES N.V., ALPHONS IACOBELLI, JEROME DURDEN, MICHAEL BROWN,

Defendants.
_____/

REMOTE MOTION HEARING - DEFENDANTS' MOTIONS TO DISMISS

BEFORE JUDGE PAUL D. BORMAN
United States District Judge
231 West Lafayette Boulevard
Detroit, Michigan
Tuesday, June 23, 2020
10:02 a.m.

APPEARANCES:

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(Appearances continued)

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(Call to order of the Court, 10:02 a.m.)

THE LAW CLERK: The United States District Court is now in session; the Honorable Paul D. Borman presiding. Court call -- the Court calls Case Number 19-1329.

THE COURT: No, 134 --

THE COURT CLERK: 13429, GM versus FCA.

THE COURT: Okay. So just to complete, this is General Motors LLC, General Motors Company, plaintiffs, versus FCA US LLC, Fiat Chrysler Automobiles N.V., Alphons Iacobelli, Jerome Durden and Michael Brown.

I'm Judge Paul Borman. I have been assigned this case. Can the lawyers hear me? Let's start --

MR. HOLLEY: Yes, Your Honor.

THE COURT: Let's start with Mr. Willian.

MR. WILLIAN: Yes, Your Honor. I can hear you fine.

THE COURT: Is that the correct pronunciation, sir?

MR. WILLIAN: It is, Your Honor. Thank you.

THE COURT: Okay. Mr. Haley? Holley, sorry.

MR. HOLLEY: Good morning, Your Honor. I can hear you very well. Thank you.

THE COURT: Very good.

Is it pronounced Nedelman or Nedelman?

MR. NEDELMAN: Nedelman, Your Honor.

THE COURT: Nedelman. Okay. Can you hear me?

MR. NEDELMAN: Yes, Your Honor.

THE COURT: And Mrs. Lizza, you can hear us all?

THE REPORTER: I can.

THE COURT: Okay. The Court notes that Defendants Brown and Durden join in FCA's motion to dismiss. With me on this Zoom webinar are my courtroom deputy, Deborah Tofil; my law clerk, Maura Allen; and my court reporter, Leann Lizza.

Mrs. Lizza has the toughest job, so counsel must and will speak slowly and loudly.

So would the counsel again please identify themselves for the record beginning with General Motors.

MR. WILLIAN: Yes, good morning. This is Jeff Willian. I represent the plaintiffs in this case.

THE COURT: Thank you, sir.

FCA and FCA N.V.?

MR. HOLLEY: Yes, Your Honor. Steven Holley, H-O-L-L-E-Y, from Sullivan & Cromwell for the defendants, FCA US LLC and Fiat Chrysler Automobiles N.V.

THE COURT: Thank you.

And for Mr. Iacobelli.

MR. NEDELMAN: Good morning, Your Honor. Michael Nedelman appearing on behalf of Alphons Iacobelli.

THE COURT: Thank you.

Before we begin, I want to make three personal disclosures. About 20 years ago I attended a week-long seminar at which Tom Gottschalk, then GM's general counsel, now I've heard is back at Kirkland & Ellis, attended and spoke. In subsequent years, while still serving as GM's general counsel in Detroit, I would run into him on occasion and exchange pleasantries. I have not seen or spoken to Tom in more than ten years.

Second, in 2010 when Ed Whitacre was GM's CEO, a Texas district judge friend whose wife was on the Texas Tech Board with Ed called to suggest that since Ed was away from home in Detroit I should give him some local hospitality. We met for lunch, each paid his own check and it was very enjoyable. I have not spoken to Ed or seen him since then.

Finally, about three days a week I receive calls from my congresswoman, Haley Stevens, who just so happens served as chief of staff of the Obama administration's Auto Industry Emergency Rescue Team, inviting me to attend a constituent outreach meeting. These are robo calls. I have never had the honor of meeting my congresswoman, speaking with her nor have I ever contributed to her or any other political candidates because I am Hatch'ed and I want to keep this wonderful position. Thank you.

Okay. Then let us proceed with FCA's motion to dismiss the complaint.

If you mention a name of a case or an individual's name that has not been mentioned so far, please spell it to help Mrs. Lizza, the court reporter, who has the toughest job. You must speak slowly and clearly. And having looked at both of your backgrounds, all three of you, I know that you are accomplished litigators in court and that you respect court reporters and the Court.

So please proceed on behalf of FCA.

MR. HOLLEY: Good morning, Your Honor. Again, Steven Holley from Sullivan & Cromwell in New York for the defendants, Fiat Chrysler Automobiles N.V. and FCA US LLC, both of which have filed motions to dismiss GM's complaint. Consistent with the Court's scheduling order, I'm going to first address the motion to dismiss filed by FCA US LLC, and for the sake of simplicity, I will refer today to FCA US LLC as FCA and to Fiat Chrysler Automobiles N.V. as FCA N.V.

I know the Court is familiar from the criminal cases over which the Court has presided with the general circumstances giving rise to this case. Certain former employees of FCA who are named as individual defendants in this case facilitated payments to certain former employees of the United Auto Workers from funds belonging to the FCA-UAW National Training Center. GM alleges that these payments were orchestrated by FCA itself, an allegation that FCA vigorously denies. However, for purposes of this motion to dismiss only,

FCA accepted the allegations as true in arguing that GM has nonetheless failed to state a valid RICO claim.

Parroting paragraph 11 of the Alphons Iacobelli plea agreement, and that's A-L-P-H-O-N-S --

THE COURT: We have that. He's a party to the case, so in terms of those names, Mr. Holley, we have them, yeah. But I appreciate. That's better than forgetting. Okay. Go ahead.

MR. HOLLEY: Thank you, Your Honor.

Parroting paragraph 11 of the Iacobelli plea agreement, GM claims that FCA made alleged prohibited payments to the UAW in order to obtain, quote, benefits, concessions and advantages for FCA in the negotiation, implementation and administration of the collective bargaining agreements between FCA and the UAW, closed quote.

GM alleges that it did not receive similar benefits, concessions and advantages from the UAW with the consequence that FCA's labor costs were substantially lower than GM's which supposedly enabled FCA to compete more effectively against GM. So collective bargaining agreements between FCA and the UAW lie at the very core of GM's case.

In assessing the validity of GM's claims, there are three points that I ask the Court to bear in mind at the outset with regard to RICO. First, in enacting RICO, Congress was targeting the patterns of racketeering activity. It was not

purporting to federalize state tort law so that every person who claimed to have suffered some injury at the hands of someone else suddenly had a claim for treble damages under federal law.

Secondly, courts subject RICO claims to substantial scrutiny at the motion to dismiss stage, and that is true both because of the potential reputational harm suffered by defendants who are unfairly accused of engaging in racketeering activity and also because RICO cases are typically big cases like antitrust cases that involve massive amounts of discovery and courts do not want to put defendants to the burden and expense of defending against such a large case unless the claims are well founded.

And third, Your Honor, courts are particularly skeptical of RICO claims brought by economic competitors like GM's claims in this case because such claims threaten to measure the line between RICO claims and antitrust claims under the Sherman Act and the Clayton Act.

Against that background, Your Honor, the biggest flaw in GM's claims in this case is a lack of causation. GM has not plausibly alleged that with what it refers to as one and a half million dollars of alleged prohibited payments are the but-for cause as well as the proximate cause of what GM contends are billions of dollars in damages in the form of increased labor costs.

GM has two inconsistent theories about how it was supposedly injured by its alleged prohibited payments, so it is necessary to consider each of those theories separately with regard to the issue of causation.

The first theory is that from the emergence of GM and FCA's predecessor, which was called Chrysler Group LLC, from bankruptcy in 2009 through mid-2015, FCA made prohibited payments to the UAW that caused the UAW to confer various benefits on FCA such as the ability to have more tier two workers who are lower paid than GM had. According to GM, this resulted in GM having average hourly labor costs that were $8 higher than FCA's, $47 an hour in the case of FCA versus $55 an hour in the case of GM. So that's this theory number one.

Theory number two is that the alleged prohibited payments are what caused the UAW to pick FCA as the lead among The Big Three Detroit automakers in negotiating the 2015 collective bargaining agreement and that that put FCA in a position to agree to what GM calls the most union-friendly contract in history. And according to GM, FCA knew that this very rich contract it agreed to with the UAW would be pressed on GM as a result of pattern bargaining thereby increasing GM's labor costs. And GM contends that FCA's goal in raising GM's labor cost was to make GM more amenable to a merger with FCA which is a proposal that GM's board of directors had already rejected once in April of 2015.

So, first, Your Honor, I want to talk about but-for causation as applied to these two theories. Neither of them passes muster under *Ashcroft*, A-S-H-C-R-O-F-T, *versus Iqbal*, I-Q-B-A-L, in which the Supreme Court said that a claim has to be plausible on its face and not be based on mere labels or naked assertions.

Other than conclusory allegations, GM has no basis for asserting that it was the alleged prohibited payments that had caused FCA's labor cost to be lower than GM's in the period from 2009 to 2015. And the implausibility of that assertion is underscored by the fact that it was GM not FCA that was the lead in negotiating the 2011 collective bargaining agreement so GM bears primary responsibility for the impact of that contract and GM's labor costs.

And common sense dictates that a wide range of factors like the relative seniority of the GM and FCA workforces or the amount of overtime worked by employees at the two companies had a substantial bearing on the relative hourly labor costs of GM and FCA in the period from 2009 through 2015.

With regard to the second theory about the 2015 collective bargaining agreement, GM's allegations as to but-for causation are even less plausible. First, GM has not explained why it would have been necessary for FCA to make the alleged prohibited payments in order to persuade the UAW to make FCA the lead in negotiating the 2015 collective bargaining

agreement if the FCA knew that FCA -- if the UAW knew, excuse me, Your Honor, that FCA was prepared to enter into a very union-friendly contract. In fact, the UAW likely had a duty to its members to make that choice.

Second, GM itself alleges, and this is in paragraph 134 of the complaint, Your Honor, that by 2015 both FCA and the UAW knew that the federal government was investigating the alleged prohibited payments. And by the time FCA was selected by the UAW as the lead in September, 2015, the supposed ringleaders were already gone. General Holiefield of the UAW died of pancreatic cancer in February of 2015 and Alphons Iacobelli left FCA in May of 2015.

Third, the notion that the 2015 collective bargaining agreement between FCA and the UAW was structured to increase GM's labor cost through pattern bargaining makes no sense on its face when the news articles GM references in its complaint point out that a major feature of that contract was to increase the wages of tier two workers, a change that had the greatest adverse impact on FCA because, as GM points out, FCA had a much larger proportion of tier two workers than GM.

Your Honor, even if GM could persuade the Court that alleged prohibited payments were the but-for cause of its alleged injury, GM cannot escape the indirectness of that alleged injury which fails RICO's strict proximate cause test. Starting again with the period from 2009 to 2015 in which GM

claims that the UAW made various concessions to FCA and, quote, without regard to the interest of UAW members, those are GM's words not mine, Your Honor, from paragraph 71 of the complaint, the complaint itself makes clear that the most direct victims of this conduct, if it occurred, were rank and file members of the UAW. If the UAW agreed to let FCA pay its workers less money and pay less attention to worker grievances and health and safety issues, then it was plainly the UAW membership that would be most directly affected.

GM then goes on to allege that the individual defendants failed to report the alleged improper payments to the Internal Revenue Service making the federal government the next most directly affected party, and that puts GM at best in third place. But the Supreme Court has made clear in cases like *Hemi*, H-E-M-I, and *Anza*, A-N-Z-A, that only the most directly injured party can sue under RICO and efforts to go beyond the first step in the chain of causation are not permitted.

GM fares no better under its second theory with regard to proximate cause. There are many steps in the chain of causation between FCA being selected as the lead in negotiating the 2015 collective bargaining agreement and the purported injury to GM in the form of increased labor costs.

As one example, Your Honor, the original contract agreed by FCA and the UAW was rejected by UAW members and had

to be sweetened before they would agree to it. And obviously that rejection had nothing to do with the alleged prohibited payments.

Furthermore, the entire notion that FCA sought to increase GM's labor costs in order to somehow soften GM up for a merger defies economic logic. GM has not explained why having higher labor costs would make GM any more willing to merge with FCA or why FCA would ever want its prospective merger partner to be saddled with unfavorable collective bargaining agreements for the next four years.

Now, GM has various arguments about why this causation requirement doesn't apply, but none of them is available, Your Honor. First, foreseeability is not the test for proximate cause under RICO. GM asked the Court to embrace the notion that the Sixth Circuit's decision in *Wallace*, W-A-L-L-A-C-E, *versus Midwest Financial* directly contradicts controlling Supreme Court precedent by holding that foreseeability is all you need to establish proximate cause under RICO but that can not be right, Your Honor.

Another court in this district has already rejected the same attempt by a RICO plaintiff to use *Wallace* in an effort to circumvent the Supreme Court's decisions in *Anza* and *Hemi*. That case, Your Honor, is *Kerrigan*, K-E-R-R-I-G-A-N, *versus Visalus*, V-I-S-A-L-U-S, 112 F. Supp. 3d 580, Eastern District of Michigan, 2015.

And even on its own terms --

THE COURT: That's a district court case, correct?

MR. HOLLEY: Yes, Your Honor. My point was that another district court had already rejected the notion that the Sixth Circuit was overruling the Supreme Court.

But even on its own terms, *Wallace* does not help GM because unlike in *Wallace* it is not possible to, in the words of the court, trace a straight line, end quote, between the alleged prohibited payments and GM's alleged injury. The line GM is asking this court to draw is anything but straight.

Second, it does not matter that GM says it was the intended target of an alleged scheme involving FCA and the UAW. As the Sixth Circuit said in Perry, P-E-R-R-Y, against American Tobacco, quote, specific intent to harm does not magically create standing or cause injuries to be direct, unquote.

Third, the fact that GM claims it can identify an injury that is distinct from injuries suffered by more directly affected parties is irrelevant. Even if GM could establish that its injury is unique, it still has to show that that injury was directly caused by prohibited payments and that is something that GM has not and cannot do.

I'm not going to spend a lot of time with them, Your Honor, but the Supreme Court identified three factors in *Holmes*, H-O-L-M-E-S, against Securities Investor Protection Corporation that underscore why GM is not a proper RICO

[discernible].

First, others [discernible] of the alleged prohibited --

THE COURT: You're breaking up a little. Can you start that sentence again, please? "Other," go ahead. Sorry, sir.

MR. HOLLEY: Yes, Your Honor. Other more direct victims of the alleged prohibited payments can sue and have already done so. Several rank and file members of the UAW brought actions challenging the alleged prohibited payments long before GM brought this case.

Second, the notion that GM's labor costs were increased as a direct result of the alleged prohibited payments is inherently speculative and attempting to trace what GM's labor costs would have been in the absence of the alleged prohibited payments would be the opposite of straightforward which is what it's supposed to be.

Again [discernible] does not [indiscernible] does not deny that causes other than the bribery scheme, these are GM's words, may have contributed to [indiscernible].

(The court reporter requests clarification.)

MR. HOLLEY: So what I was saying is that this speculative chain of causation is especially true because GM at page 15 of its opposition does not deny that, quote, causes other than the bribery scheme may have contributed to GM's

higher costs, closed quote. And third, GM alleges in paragraph 12 of the complaint that, quote, all stakeholders in the U.S. auto industry, closed quote, were affected by the prohibited payments.

So concern about multiple recoveries is very real. The sheer number of potential plaintiffs in GM's contemplation would make an allocation of damages in this case incredibly complicated. So because GM has not plausibly alleged either but-for causation or proximate cause, all of its RICO claims should be dismissed, Your Honor.

The next problem GM faces is that it has not adequately alleged the requisite pattern of racketeering activity. The alleged prohibited payments, if they occurred, were an unfair labor practice under Section 302 of the National Labor Relations Act. Such a claim is subject to exclusive jurisdiction of the National Labor Relations Board which has a proceeding pending against FCA and the UAW relating to these very same alleged prohibited payments. It is true that improper payments to union officials under the Taft-Hartley Act are listed as a potential predicate act in the RICO statute, but that does not mean that a private RICO plaintiff like GM can assert such a claim.

In *Trollinger*, T-R-O-L-L-I-N-G-E-R, *v. Tyson*, T-Y-S-O-N, *Foods*, the Sixth Circuit held that a federal court can adjudicate a civil claim based on conduct prohibited by

federal labor laws only if, quote, the labor questions in the case amount to no more than collateral issues, closed quote.

Here, of course, Your Honor, the labor questions are absolutely central making this a labor case masquerading as a RICO case. And that's confirmed by the fact that last year the Sixth Circuit in a case called *DeShelter*, D-E capital S-H-E-L-T-E-R, *v. FCA US* dismissed claims based on these same alleged prohibited payments because they were, quote, unfair labor practice claims over which the NLRB has exclusive jurisdiction, closed quote.

Without the alleged prohibited payments as predicate acts, GM's RICO claims against FCA cannot survive.

The next problem, Your Honor, is that under 1962(b), Section 1962(b) of the RICO statute, GM has not plausibly alleged that FCA acquired an interest in or obtained control over the United Auto Workers. Now, saying that FCA used the alleged prohibited payments to gain a degree of influence over certain decisions made by the UAW is not enough. GM had to allege that FCA gained power over the day-to-day operations of the union akin to what a majority shareholder would have over a corporation. It has to be a proprietary interest not merely influence. GM has not made such an allegation, Your Honor.

The added problem is that GM was supposed to allege an injury by virtue of FCA's purported acquisition of control over the UAW, that is, quote, separate and apart from the injuries

suffered as a result of the predicate acts of racketeering activity, closed quote. That is the Sixth Circuit case called Aces, A-C-E-S, High Coal Sales Inc. against Community Bank and Trust from last year. But GM did not even attempt to allege a distinct acquisition of control injury different from its alleged predicate acts.

Finally, Your Honor, moving to the statute of limitations, all of GM's claims premised on conduct that occurred prior to November 20, 2015, four years before GM brought this case, are barred by RICO's four-year statute of limitation. GM wants to avoid that result by arguing that the statute of limitations did not begin to run until GM discovered what it calls the bribery scheme involving FCA and the UAW. But as the Supreme Court made clear in a case called *Rotella*, R-O-T-E-L-L-A, *versus Wood*, it is the discovery of the alleged injury not discovery of the other elements of a RICO claim that starts the clock running. And GM knew that its hourly labor costs were substantially higher than FCA's long before November 20, 2015, based on publicly available information. Yet [discernible] --

THE COURT: Start that again, please. I had to move a page. Sorry.

MR. HOLLEY: No problem, Your Honor.

THE COURT: I will issue a warning when I have to move a page or get a court decision to quote, so I apologize to

Mrs. Lizza and I'll do a -- I'll say "stop" and we'll go from there. So please repeat that. Thank you.

MR. HOLLEY: Yes, Your Honor. So the point I was making is that GM knew that its hourly labor costs were substantially higher than FCA's long before November 20, 2015, based on publically available information. Yet GM sat on its hands for more than two years after the first indictment was unsealed in the criminal cases involving the alleged prohibited payments deciding to bring this case only after FCA announced its intention to merge with Groupe PSA in France, the maker of Peugot and Citroen cars. Your Honor, such a lack of diligence and strategic behavior should not be rewarded.

THE COURT: So you're saying forget about the four-year statute of limitations because actions took place that created a situation where they would know that they had been harmed and those actions bolster your argument with regard to the statute of limitations? Is that what you're saying?

MR. HOLLEY: Not exactly, Your Honor. What we're saying is that we accept the proposition that the 2015 collective bargaining agreement which was ratified literally, you know, four years to the day before we brought their lawsuit is within the statute of limitations. We think that claim should be dismissed for multiple other reasons. But conduct that occurred before, you know, November 20 of 2015 is not a valid basis for a RICO claim because it's barred by the

four-year statute of limitations.

THE COURT: Thank you.

MR. HOLLEY: So, Your Honor, I would now propose to move to FCA N.V.'s motion to dismiss, if that's all right with the Court.

THE COURT: Why don't we stop on this right now and then I've allotted a separate time for the N.V. So we're going to do the -- well, you know what? Let's go ahead with N.V. because that's just another ten minutes on top of that. So it will assist the Court. Go ahead.

MR. HOLLEY: Yes, Your Honor. So with regard to FCA N.V.'s motion to dismiss, GM improperly seeks to shift the burden to FCA N.V. but it was GM's burden to make a prima facie showing that the Court can exercise personal jurisdiction over FCA N.V. consistent with the dictates of the due process clause. That's not what GM did.

Just for starters, GM does not contend that FCA is subject to a general jurisdiction nor could GM make that contention because FCA N.V. is not at home in Michigan which is what GM would be required to show under the Supreme Court's decision in *Daimler*, D-A-I-M-L-E-R, *versus Bauman*, B-A-U-M-A-N. GM does not deny that FCA N.V. is a Dutch corporation with its principal executive offices in London. Instead, GM asserts that FCA N.V. is subject to specific jurisdiction. But in its 95-page complaint FCA fails to plead any facts demonstrating

that FCA N.V. had purposeful contacts with the State of Michigan or the United States, for that matter, and that GM's claims in this case arose from those contacts. Nothing in the indictments, the plea agreement or the sentencing memoranda on which GM places such great reliance in its complaint even suggests that FCA N.V. had anything to do with the alleged prohibited payments much less that the parent company in the Netherlands orchestrated those payments as part of a scheme to harm GM.

THE COURT: Was Mr. Marchionne -- was Mr. Marchionne the head of FCA N.V. and FCA when he passed?

MR. HOLLEY: Yes, Your Honor, he was the CEO of both corporations.

THE COURT: Thank you.

MR. HOLLEY: GM tries to hide the absence of facts of FCA N.V. by engaging in group pleading referring to something called FCA Group throughout the complaint which GM defines to include both FCA US and FCA N.V. but there is no corporate entity called FCA Group. There's FCA N.V., the parent company which is a holding company, and its wholly-owned operating subsidiary in the United States which is FCA US LLC.

Comparing the allegations in the complaint to the documents that GM relies on as support for those allegations makes clear that the actions attributed to FCA Group do not implicate FCA N.V. at all. For example, Your Honor, in

paragraph 70 of the complaint GM alleges that, quote, FCA Group funds, closed quote, were used for lavish dinners and golf outings for UAW officials. As support for that allegation, GM relies on the plea agreement of Norwood Jewell. I think he's probably someone you're familiar with.

THE COURT: Quite.

MR. HOLLEY: N-O-R-W-O-O-D. But that document says nothing about FCA N.V. At pages 9 and 10 it states that the funds at issue were FCA funds, and FCA in the plea agreement is defined as FCA US not FCA N.V.

GM's allegations that the prohibited payments were made, quote, with the knowledge and the approval of FCA N.V. is similarly unavailing. That allegation concerns a purely passive act even if it occurred not the sort of intentional act directed at the forum state which is what you need to support specific jurisdiction. And GM's conclusory allegations that FCA N.V. acted through Mr. Marchionne who, as the Court pointed out, was the CEO of both FCA N.V. and FCA US at the relevant time is not a basis for asserting specific jurisdiction.

GM alleges no facts to overcome the well established presumption which comes from the Supreme Court's decision in *U.S. v. Bestfoods*, B-E-S-T-F-O-O-D-S, one word, that an officer holding positions with both a parent company and its subsidiary is acting on behalf of the subsidiary. And that presumption makes particular sense here because GM alleges that

Mr. Marchionne took actions in Michigan to influence the negotiation of collective bargaining agreements between FCA US and the United Auto Workers, contracts to which FCA N.V. was not a party and which related solely to U.S. workers in U.S. factories. Those contracts had nothing to do with the Netherlands, Your Honor.

In sum, GM has not plausibly alleged that FCA N.V. engaged in activities in Michigan that gave rise to GM's claims. Having failed to make a prima facie showing of specific jurisdiction as to FCA N.V., it was not necessary for FCA N.V. to introduce evidence on this motion confirming that it was not subject to specific jurisdiction in the United States.

And very briefly, Your Honor, even if the Court were to conclude that it could exercise personal jurisdiction over FCA N.V. and was not persuaded to dismiss the entire complaint based on the deficiencies I noted earlier today with regard to FCA US's motion to dismiss, the Court should nonetheless dismiss the claims against FCA N.V. under Rule 12(b)(6).

GM was required to plausibly allege that each defendant, not in a group but each defendant, was involved in the performance of the requisite predicate acts of racketeering activity. But if you look at the complaint, the only references to FCA N.V. are a description of FCA N.V. in paragraph 17 of the complaint, a purported statement of the

basis of personal jurisdiction over FCA N.V. in paragraph 42 of the complaint and a conclusory allegation in paragraph 64 of the complaint that FCA N.V. had, quote, knowledge and approval, closed quote, of the alleged prohibited payments. Such thread bare allegations are not sufficient, Your Honor, to state a RICO claim against FCA N.V.

Thank you, Your Honor. That's all I have on those two motions to dismiss. I would be happy to answer any questions the Court may have.

THE COURT: Not right now. I may have when you return.

Okay. Now we're up to Mr. Nedelman.

MR. NEDELMAN: Thank you, Your Honor. Again, Michael Nedelman appearing on behalf of Alphons Iacobelli.

I believe that Mr. Holley very capably discussed the case law regarding the requirement for but-for causation, but I think it's important to even take a step back. Despite 95 pages by General Motors in its complaint trying to weave a compelling story, General Motors never actually alleges in the complaint that but for the alleged predicate acts General Motors would not have suffered damages.

In the absence of that very simple statement, it's fatal to the maintenance of General Motor's claims. It could have done it had it wanted to fulfill its pleading requirements, but I think there's a -- an understandable reason

why it didn't. And the reason that it didn't is because there is no way for General Motors in good faith to plead that but for the alleged predicate acts GM wouldn't have suffered the damages that it claims to have suffered.

Without abject speculation, there is no way that General Motors could have alleged the terms and conditions that it alleges it would have reached in the UAW different than the terms and conditions it ultimately reached. What General Motors is actually asking this Court to do, Your Honor, is to award -- well, first, allow GM to pursue a claim and then award damages based upon the speculative outcome of a hypothetical set of labor negotiations that would have the Court reenact the 2015 labor negotiations, assume that but for the predicate acts GM would have been identified as the initial target then speculate further on what the ultimate terms and conditions of that labor negotiation would have been, further assume that the UAW would have recommended those terms and conditions to its membership and then further assume that the membership would have agreed to those terms and conditions.

That speculation, that very type of analysis is speculation in the extreme and the type of speculation found infirm in *Empire Merchants*, E-M-P-I-R-E, *Merchants, LLC versus Reliable Churchill LLP*, is the type of speculation that this court could never and should not engage in.

So even though -- even if GM had alleged but-for

causation which it didn't, which is fatal to its claim, the nature of the speculative inquiry that this Court would have to entertain bars the maintenance of this claim.

I agree with Mr. Holley on behalf of FCA that under controlling case law the complaint fails to adequately plead proximate cause and that that alone is sufficient to compel dismissal of this case. The statute of limitations argument, I differ with Mr. Holley in only the following regard. While I agree that everything well prior to November 20 of 2015 is barred, I think the Court's inquiry has to go a little farther than that. The Supreme Court in *Rotella* has said, well, look, if there are storm warnings, if you should have been aware, if you should have been on inquiry, if you had notice, the clock starts running. Well, General Motors in its complaint and, in particular, if I pick the latest dates, at complaint paragraph 132, General Motors itself alleges that in October of 2015 it conducted its own analysis of the UAW contract and concluded that it would be damaged in its view by the application of the pattern bargaining system as the next in line to negotiate with the UAW. And that should have been sufficient to trigger at the absolute latest the running of this four-year statute of limitations, and the filing of a complaint on November 20 of 2019 was simply too late.

I would also note a significant difference between the positioning of FCA and that of Mr. Iacobelli because

Mr. Iacobelli, as Mr. Holley noted, departed from FCA and the National Training Center on June 9th of 2015. The four-year statute of limitation could not have extended to November 20 of 2019 which GM attempts to do.

And for that reason and for the reasons set forth in our moving papers, we request the complaint be dismissed. Thank you, Your Honor.

THE COURT: Okay. Thank you, Mr. Nedelman.

Before we take a break and then, Mr. Willian, as you argue, we're going to take a break, but I may say "stop." It is not intended to be rude. It is only intended to let me -- to grab a paper or a case and to then follow your continuing argument. So just be aware of that because Mrs. Lizza has the toughest job and I did not realize that when I usually grab papers that it does interfere with the argument.

So we'll see everybody in ten minutes. Thank you.

MR. NEDELMAN: Thank you, Your Honor.

(Court in recess, 10:47 a.m. to 10:54 a.m.)

THE LAW CLERK: Court is back in session.

MR. WILLIAN: Hello, Judge. I could not hear you there for a moment.

THE COURT: Can you hear me now?

MR. WILLIAN: I can, yes, sir.

THE COURT: Why does it show a lock, Jason, on my screen, on the right?

Maura, do you know why?

MR. OWENS: It has to do with the configuration of the unit itself. It's something you can ignore.

THE COURT: Okay. Okay. These days it's hard to ignore technological innovations.

Okay. Mr. Willian, please.

MR. WILLIAN: Yes. May it please the Court, my name is Jeff Willian. I represent the plaintiffs General Motors LLC and General Motors Company.

With great specificity based significantly on defendants' own criminal admission, GM has alleged a long-running racketeering scheme designed to directly harm GM and provide FCA and FCA N.V. with a competitive advantage. This was a pay-to-harm scheme implemented by defendants literally within weeks of entering the U.S. marketplace in 2009. Year after year FCA bribed UAW leaders to provide FCA with certain structural labor advantages that were expressly denied to GM and then eventually --

THE COURT: Are you saying that when it came out of bankruptcy, wasn't there a calculus that Chrysler was saved because they had to merge with someone or -- and the President even said you have to merge with we'll call it FCA or you're going to go under. And so wasn't that part of the calculus in creating the benefit for FCA, and GM at the same time received the President's attention to the extent that there's no way

that he was going to let it go under. So weren't those benefits part of the TARP rescue program that FCA should get to stay alive because of the cost structure at that time and didn't those continue on?

MR. WILLIAN: No. No, sir. So the structural elements that we're talking about are labor components that had nothing to do with that. Those are advantages that were purchased through a bribery scheme. And so -- and we detail those with great detail. They relate to World Class Manufacturing, tier two and tier one. They relate to temps. Those aren't derived specifically from any regulation or TARP. Those were the specific subject of bribery. Those advantages were purchased through bribery and logically they could not be given to GM, the same advantages.

And that's precisely what we allege, that this was a pay-to-harm scheme. And the key here, Your Honor, the key here is the industry itself. The industry here --

THE COURT: When you say pay to harm, you're talking about pay to harm GM not pay to harm UAW workers.

MR. WILLIAN: That's precisely correct, Your Honor.

THE COURT: Okay. Now, you had Global Manufacturing, but that was your program that was comparable to FCA's World Class Manufacturing, but you're saying it wasn't comparable because of your claim about pay to play.

MR. WILLIAN: That's correct, Your Honor. So with

respect to manufacturing operations, pay to play involved FCA paying to get labor flexibility for their World Class Manufacturing which is a program that was expressly denied to GM. GM asked for this advantage and it was denied, and it was denied because of the bribes.

THE COURT: It was denied because of the bribes or it was denied because of the way they rolled out of bankruptcy where the government had said FCA is a mess or Chrysler is a mess, the last chance is for FCA to take over Chrysler and we're going to give them some degree of assistance to try and let them recover and keep those jobs in the Chrysler/FCA area to allow the company to survive and progress.

MR. WILLIAN: So we understand that Chrysler -- everyone wanted Chrysler to survive, but once they rolled out of bankruptcy, after they rolled out of bankruptcy the question is how would they operate --

THE COURT: You're saying everyone wanted Chrysler to survive. Did GM want Chrysler to survive or did they want to pick off -- if it went under, did they want to pick off Jeep and Ram and maybe mini vans too?

MR. WILLIAN: Well, certainly the government wanted Chrysler to survive, but my point is, Your Honor, after Chrysler rolled out of bankruptcy and starting in May of 2009, it -- to make sure that it didn't crash, Mr. Marchionne and Mr. Iacobelli implemented a bribery scheme. It's well

documented, and the very fundamental purpose of that scheme, as Mr. Iacobelli admits, was to purchase advantages that were to be denied to GM. That was -- GM was the intended target of the scheme because Chrysler wanted or FCA wanted to outcompete GM.

THE COURT: Didn't Mr. Iacobelli, when he left FCA, get hired by GM?

MR. WILLIAN: He did, Your Honor. At that time, of course, GM had no indication whatsoever there was any sort of scheme that was going on nor was that ever disclosed to GM at the time by Mr. Iacobelli.

THE COURT: And GM, I presume, vetted him and knew he was driving a 300 and something thousand dollar car and doing all these various financial issues on his behalf personally and...

MR. WILLIAN: Yeah. I understand the question, but GM did vet him and had absolutely no knowledge whatsoever nor is it in the complaint that Mr. Iacobelli had engaged in this bribery scheme since 2009 nor could it. Mr. Iacobelli took many, many steps to hide that scheme.

THE COURT: Okay.

MR. WILLIAN: So if I could go to but-for cause, Your Honor. But-for cause in a nutshell is --

THE COURT: Let's also use the term "proximate cause" because that's pretty heavy in the Supreme Court decisions with regard to the issue that we're facing.

MR. WILLIAN: I -- that's fine, Your Honor. I first will address but-for cause and then I'll go to proximate cause.

THE COURT: Okay. Thank you.

MR. WILLIAN: They are separate.

So in a nutshell there should be no question that GM has alleged but-for cause here. It's alleged that FCA's fraudulent scheme made perfect economic sense if one is willing to commit fraud, bribe union leaders who control the labor markets to harm a competitor by using their bargaining power to impose higher costs on a competitor. That is the definition of but-for cause. The bribes cause GM economic harm.

If you want to go to 2015, we can go to 2015. FCA makes the argument that that scheme as alleged made no economic sense, that Mr. Marchionne would craft such an outsized CBA with asymmetrical costs to harm GM to force a merger, but, Your Honor, you need go no further than look at the words of Mr. Marchionne that are alleged in the complaint at paragraph 116. Mr. Marchionne states openly in June of 2015 that it would be unconscionable not to force a merger. That was his goal --

THE COURT: He definitely from day one I think, even before he took over, had the idea of creating a merger between those two entities. The question is whether that intent to try and create a merger is in play here to the extent that everything that occurred was done to try and create a merger

and it was done illegally. But there's no question that he did seek a merger, then they had Operation Cylinder and he tried to proceed with those matters. But that doesn't mean that there was a proximate cause situation here with regard to the CBA in 2015 which you have said benefited Chrysler workers significantly. So the fact that Chrysler was a target or I'll call it FCA, does that mean that, therefore, GM was a victim?

MR. WILLIAN: Well, the target was GM. GM was the victim of this scheme and, again, we can go to Mr. Marchionne's own words which we point out in our response and have never been addressed by FCA, and that's at paragraph 129 of the complaint where Mr. Marchionne, after the 2015 CBA had been negotiated and before it was going to be pressured on GM through the power of pattern bargaining, stated the economics of the deal are almost irrelevant because the costs pale in comparison to the magnitude of the potential synergies and benefits of, as we allege, forcing a merger with GM. He all but admitted the scheme other than the bribes. And the only way he was able to accomplish that CBA which included asymmetrical costs to harm GM was to secure the lead through bribes and then he crafted it to harm GM and he admitted that here openly. It was a bribe-fueled negotiation with the UAW.

THE COURT: When you say he admitted bribing people to get a deal or you're saying that the facts played out, showed a bribe?

MR. WILLIAN: So obviously he didn't admit. I said he admitted to the scheme all but the bribes, I thought, and obviously eventually we learned that his dealings with the UAW in connection with the 2015 CBA was fueled by bribery.

The but-for cause, Your Honor, has easily been met, and I'll turn to proximate cause unless you have further questions on but-for cause.

THE COURT: Please proceed.

MR. WILLIAN: So with respect to proximate cause, an important procedural point for the Court is this argument only goes to the 1962(c) claim. It does not go to the 1962(b) claim. I think the Court is well aware of that, but I just wanted to make sure that was clear on the record.

So --

THE COURT: The proximate cause does not go to all the RICO claims? You're saying that there's a gap in the law?

MR. WILLIAN: No, I'm not, Your Honor. So when you look at all the authorities that are cited having *Anza*, *Holmes*, et cetera, they are -- those cases are addressing a 1962(c) proximate cause claim. 1962(b), the proximate cause is quite different. There the harm has to come from the control itself. So here we've alleged that the UAW, their decision making for the CBAs were controlled and that is easily met. So here with respect to the 1962(c) claim, the harm has to come from the racketeering activity, the bribes themselves. So it is a

different analysis and the arguments of defendants only on proximate cause, if you go back in the briefs, you'll see that's confirmed, only go to 1962(c).

THE COURT: Well, I think they cite the Supreme Court decisions to say proximate cause within the RICO claim means proximate cause, period.

MR. WILLIAN: Understood. The authority that we're speaking about and the arguments that are being made go to 1962(c). But regardless, the first critical point I want to make to this court is that it is the nature of this industry that allowed FCA to inflict racketeering harm on GM. The UAW controls the labor markets for both FCA and GM. It exclusively represents both GM and FCA workforce. It's with this market power with its principle function of negotiating a CBA and administering the CBA that the scheme was able to be pulled off. So once the UAW became willing to accept bribes to impose higher costs on our competitor, and did so as alleged here, the direct harm is claimed. The UAW had the power to directly harm GM. It had that position and it did accept those bribes and, as alleged, it directly harmed GM.

Nobody else, Your Honor, nobody else suffered these higher labor costs. Nobody else has a claim for these higher labor costs. There's no issue of allocation. There's no issue of double recovery. Only GM has suffered this harm.

I would ask the Court to look closely, as it will, I'm

sure, to the *Bridge* case and the Seventh Circuit's *Empress Casino* case. In both those cases, it was the nature of the industry that allowed direct harm from one competitor to another. In *Bridge* it was that unique closed auction system where one competitor was able to rig the auction and caused direct harm on another competitor. In the *Empress Casino* it was a competitor's bribe to a governor who like the UAW had the power to take action, there sign a harmful piece of legislation into law and directly harm a competitor.

So the point is this industry is like those industries. There's the opportunity for the direct harm because the UAW sits in the middle of GM. It sits in the middle of FCA and controls their labor markets. The line --

THE COURT: Didn't the UAW workers vote down a contract so -- you're saying the UAW, if the workers vote down a contract, they're acting independently? Doesn't GM have the ability to say no, we're not going to follow -- in other words, going into bankruptcies, you're saying there was a pattern, all the labor experts say there was pattern bargaining, and even though when they came out there were differences between the pay structures of the companies that they came out of the bankruptcy situations that the government was well aware of in terms of the TARP program and was going to try and was recommending continuing for a while, and you're saying the awhile meant stop at a certain point and then you're saying

everything had to be specifically pattern bargaining even though GM on its own could resist a pattern, could call a strike and proceed that way.

MR. WILLIAN: So we have detailed allegations on pattern bargaining. It is a effective tool. It has market power because it is backed up in 2015 by the threat of strike as GM recently experienced. So you can say that GM could just say no, but it can't. It's foreseeable, it's a natural that when a specific labor term is trying to be pushed onto GM that the power of the UAW and the power of pattern bargaining would allow that to happen. That's what pattern bargaining is; it's an effective tool.

THE COURT: Was pattern bargaining something that had the same control after the bankruptcies and going forward? Yes, they did talk about pattern bargaining and, yes, the UAW did pick FCA but does that mean that automatically GM suffers because they pick FCA, they get a rich contract. You're saying the fact that the FCA bargaining created a rich contract for their employees hurt GM because GM also would have to follow and provide a rich contract for their employees?

MR. WILLIAN: So I'm saying two things, Your Honor. First, as of 2015, which is what your question goes to, the CBA was agreed to and then GM had to follow pattern. UAW used their bargaining power, their power of strike to naturally push that contract onto GM. Yet the consequences of GM not agreeing

to pattern is a very costly strike. That is proximate cause, Your Honor, because it's foreseeable and it's natural that the power of pattern bargaining could be used to force that on GM. That's 2015 and pre-2015 is different.

So pre-2015 the pattern of power bargaining does not come into play like it does in 2015, because in 2011 there was no right to strike by the UAW and so pre-2015 these were specific structural programs that would have saved GM money that it asked for and the UAW denied because it was being bribed. FCA instructed it was not to give those programs to GM and GM was denied those savings programs incurring higher costs. That is the definition of direct harm, Your Honor.

THE COURT: You're saying that FCA not just got a benefit but also said don't give these to GM or was the UAW saying the whole structure going forward was different between these companies and the fact that FCA got certain concessions meant that if GM then was following, that they were a potted plant, that they had to, to use Brendan Sullivan's words from back many years ago, that they didn't -- they were straightjacketed by this program and could not be an independent thinker or an independent player within the automotive industry?

MR. WILLIAN: So it's obviously not what we're alleging, Your Honor. The point is the UAW has market power. The UAW can say no and there's nothing GM can do about it.

It's a controlled labor force. Think of it as monopoly power. So when GM asked for the same labor advantage that FCA got and it's denied, it has reasons to believe that perhaps the UAW is acting in good faith, but we now know that it was part of a bribery scheme.

And as to proximate cause, Your Honor, it's a very straightforward analysis. Bribes from FCA went to UAW who had the power to harm GM by denying them those same structural labor programs, and they did it. That is classic --

THE COURT: You're saying the UAW did it but the UAW is not a defendant in this case and they seem to be the one that everything is aimed at, their conduct. And yet they're not a defendant in this case, correct?

MR. WILLIAN: They are not a defendant in this case, that's correct, Your Honor. But as alleged, they are a co-conspirator, and we've alleged that at great length obviously, and here we're alleging that the UAW was used as a tool essentially, they had bargaining power, they were bribes and they were used as a tool to directly harm GM. They had the power to do so and they did.

THE COURT: Thank you.

MR. WILLIAN: Staying with proximate cause for one minute, Your Honor.

THE COURT: Please.

MR. WILLIAN: Yes. We would ask the Court to closely

follow *Wallace*. *Wallace* has many helpful factors in it, but --

THE COURT: Okay. Let me just help Mrs. Lizza, *Wallace v. Midwest Financial*, 714 F.3d 414, Sixth Circuit, 2013.

Let me just read a couple quotes from *Wallace* where it begins and then you can go with regard to where it continues. And if my paper reading impacts Mrs. Lizza, let me know and we'll get it straight.

So in *Wallace*, the Supreme -- the Sixth Circuit says "The Supreme Court has held in no uncertain terms that under each provision a plaintiff must show that the predicate acts not only were a but-for cause of injury but were the proximate cause as well, citing *Holmes versus SIPC,*" which we talked about before.

Proceeding further, the Sixth Circuit says "In *Holmes*, the Supreme Court explained that this language requires plaintiffs to plead and prove proximate causation."

Thereafter in the opinion, the Sixth Circuit discusses Court of Appeals decisions *Perry versus American Tobacco* and also see *Hemi Group* which talks about the requirement about proximate cause.

The Sixth Circuit then goes over and talks about foreseeability and then says that "while proximate cause is flexible," and it then cites *Bridge*, but it doesn't cite *Hemi Group* for that and *Hemi Group* came after *Bridge* in 2010.

Bridge was in 2008.

The Sixth Circuit then says, "However, the Supreme Court recently held," again, citing *Bridge* but not *Hemi* which was more recent than *Bridge*, "that proximate cause can be a little -- not axially proximate cause," and then it cites Justice Thomas's dissenting and concurring opinion in *Anza* which is, again, a dissenting and concurring opinion.

So I have a question about -- and then the impact of *Wallace* as whether it really undermines Supreme Court precedent, changes it or fails to recognize what the court held in both *Anza* and in *Hemi* group when it says the -- because -- in *Hemi Group* which is 130 Supreme Court 983, "We explained," talking about prior decisions, "proximate cause is required and, as we reiterated at *Holmes*, the general tendency of the law in regard to damages is not to go beyond the first step." And then the Supreme Court said that in this situation that "our precedent", this is in *Hemi Group* again, at page 12, "Our precedent made clear that in the RICO context the focus is on the directness of the relationship between the conduct and the harm. *Anza* and *Holmes* never even mention the concept of foreseeability."

Okay. Go ahead. I'll hear your argument on *Wallace* and the other cases, but I thought it important to, as I read these, to at least quote the Supreme Court precedent and the point within *Wallace* where it repeats the Supreme Court

precedent but yet goes into a further discussion of a concept that I think the Supreme Court has not in any way accepted.

MR. WILLIAN: So the point I would make is importantly to the Court's observations. GM's claims do not depend on foreseeability. GM's claims are direct. Just like in *Hemi*, there is one step to causation. You have a bribe from FCA to the UAW who has the power to harm GM and it does so by denying it specific labor advantages. Or in the case of the 2015 CBA, pressuring GM through the power of pattern bargaining to accept the CBA that it did that cost GM an extra billion dollars above what the UAW initially negotiated with it.

These are --

THE COURT: So both of those help the workers, they get better deals under the CBAs, but you're saying that's corrupt.

MR. WILLIAN: So we have to break down the pre-2015 and the 2015, Your Honor.

THE COURT: Okay.

MR. WILLIAN: So with respect to the 2015 CBA, yeah, incidentally that probably helped the FCA workers or the UAW workers but it --

THE COURT: And the GM workers.

MR. WILLIAN: And the GM workers. But it was corrupt because FCA was able to obtain the lead through bribes and then, as we allege, they crafted a CBA to asymmetrically harm

GM because it had a higher number of tier one workers, itself a product of the prior bribery scheme. Yes, that is direct harm.

But let's go back to the pre-2015 allegations, Your Honor. There the line is straight and direct. The bribes went from FCA to the UAW. The UAW had the power to harm GM and they denied those advantages to GM. And the point I wanted to make out of *Wallace* which I think the Court will agree has not been in any way contradicted by *Hemi*, is the Court found in *Wallace* it highly relevant that the proximate cause analysis that *Wallace* was the targeted victim, highly relevant. And as the Court stated, once we accept *Wallace*'s status as the intended target, the link between the scheme and the injury is plain to see. That is the same here, Your Honor. GM has alleged that it was the targeted victim. Mr. Marchionne's own words make that clear. And, therefore, the line, the proximate cause, is plain to see.

THE COURT: When you say his own words, specify, please.

MR. WILLIAN: Yeah. They're the same words that I specified before, Your Honor, that Mr. Marchionne said it would be unconscionable not to force a merger with GM and then --

THE COURT: He did that goal from day one when he took over -- when the government said take it over and save us, and I know your complaint mention -- that, you know, they paid not $1 for it, but at the same time he said I have FCA, wouldn't it

be great if we could merge with GM to save everybody a lot of money, to help workers to get better pay and to help the auto industry in the United States.

MR. WILLIAN: Yes. And that could be a completely legal goal. The only problem is, Your Honor, that he tried to accomplish that goal through bribery. That's alleged in detail first to obtain a competitive advantage against GM by making sure that GM had higher labor costs. He did that through bribes, then trying to force the merger in 2015.

So he's admitted the outline of the scheme, if you will. And we only learned about the bribery part of it much later, after January of 2018.

THE COURT: Thank you.

MR. WILLIAN: So concluding on proximate cause, Your Honor, the line from the bribe to the UAW to GM is straight and simple, and the ultimate point is only GM has these -- this claim for damages, nobody else does. There's no issue of apportionment; there's no issue of proximate cause. I'm sorry, there's no issue of speculative damages. And that's why this case is different than *Holmes* and *Hemi* and *Anza* --

THE COURT: Well, you say there's no speculative damages. In terms of damages, was Ford damaged?

MR. WILLIAN: They may very well have been damaged, Your Honor. We don't know the answer to that. We don't know their labor structure. But it doesn't -- it's not relevant --

THE COURT: But with regard to the damages issue, you're saying that we're going to -- if the Court finds that you are the victim proximately, that damages then are calculated based on hourly workers, based on plant locations, based upon tier workers during particular times, based on the various. Each category goes into that. How speculative or how deep diving will we be going to try and assess damages in this case and how many months and months of experts and testimony and calculations will there be to try and see what -- if there are damages, what the damages were, when they occurred or are you saying, Judge, that's not for you to think about now, but at the same time there are cases which say, look, that's why we have proximate cause, so you don't have to try and go after and decide about damages but here, will it be close to mega litigation on damages that will be down the road if the Court finds for GM?

MR. WILLIAN: So unlike the damages asserted in all the cases, the proximate cause cases cited by the defendants, we're not seeking lost sales or market share. We're not seeking those type of speculative damages. We are seeking damages for GM's increased labor cost because of these bribes. That is a cost accounting issue, Your Honor. That's exactly what these companies do all the time. They track their labor costs. So we don't think the damages here are terribly complex. So, for example, if you take the formulary, GM asked

for this formulary, it was denied. It's easy to calculate how much that would have saved GM every year. So the damages here aren't terribly complex, and they don't speak to indirectness, Your Honor, at all.

We would refer the Court to the remand of the *Bridge* case. I'm going to give the Court a case cite. It's *BCS Services Inc. v. Heartwood*, 637 F.3d 750, Seventh Circuit, 2011. That's the remand of the *Bridge* case, Your Honor. And in that case it turned out damages were complex once the factual record was developed. And the district court there said damages are complex, therefore, no proximate cause. And the Seventh Circuit reversed and said that's not the proper analysis.

THE COURT: Oh, I'm not saying that because damages are complex there's no proximate cause. I'm just talking about a down-the-road situation in this case. And in terms of -- well, go ahead, sir. I'm sorry.

MR. WILLIAN: Well, and that's fine. I would just ask the Court to look at that with respect to the differences between fact of damage and complexity in calculating damages.

And then to just finish off that answer, with respect to the 2015 CBA, the damages are straightforward. We know what the UAW had initially agreed to with GM as far as the cost of the 2015 CBA and we know what eventually was forced on us through the power of pattern bargaining as a result of the

bribe-fueled negotiations. And that's approximately a billion dollars, Your Honor, and that's easily calculable.

THE COURT: And that was forced upon you, and you had no ability to decide whether to accept or take a strike with regard to that, correct?

MR. WILLIAN: So the answer is, Your Honor, with respect to power of pattern bargaining, which is alleged in detail in the complaint, GM had very little choice. It could take a strike, I suppose, but the point is that would be extremely costly. And so the point is that the UAW has market power, the power to carry out the wishes of FCA and force this contract on us to try to force the merger and that's --

THE COURT: Thank you.

MR. WILLIAN: That is alleged in the complaint, and obviously this is a 12(b)(6) motion and all those allegations should be accepted as true.

I will -- I'm over my time, Your Honor, so it's --

THE COURT: That's okay. If you want to deal with FCA N.V., I'm not going to stop.

MR. WILLIAN: Okay. I believed the other issues are well briefed. Would you like to hear any comments on the preemption argument, Your Honor?

THE COURT: This is your argument, and I'm not going to stop you. If you want to proceed shortly with regard to that, because I had a lot of questions here, the extent that

your opposing counsel I didn't have questions, so I'm giving you the opportunity in fairness.

MR. WILLIAN: So just briefly on the preemption argument, Your Honor, that argument is contradicted by the plain language of the RICO statute and the precedent of every court that has ever considered the issue. Obviously, Congress included Section 186 violations in the RICO statute because they intended those to be included as predicate acts in the RICO claim. There's no carve-out from that whatsoever. The legislature has spoken. That's why every court who has considered the issue of preemption when there's a 186 RICO claim has said -- has denied preemption.

The only case that FCA cites in support, this is the *Trollinger* case. The *Trollinger* case did not consider the issue of 186 being in a RICO statute though it is off point. So we would ask the Court to follow the precedent of the courts who have actually considered the issue and *Trollinger* did not.

On the issue of control, briefly, we believe we've clearly met the standard of pleading control here. I heard counsel argue today. I thought they had recognized they had made an error in stating the standard in the brief that proprietary control is needed. That is not the case, Your Honor. Proprietary control does not need to be alleged. Here we've cited the cases that indicate control must be read broadly, and importantly we cited the cases that indicate that

where a plaintiff alleges that causing an entity to enter into transactions that it would not otherwise have entered constitutes sufficient control. We've alleged that in detail in the complaint that the control caused the UAW to enter into transactions they would not otherwise do. I'll let the complaint speak for itself on that because that's extremely detailed.

Finally on the statute of limitations, Your Honor, FCA has misapplied the standard that should govern here, as this Court has recognized the standard is one of discovering -- learning about the possibility of fraud. GM did not learn about the possibility of fraud until Mr. Iacobelli's plea agreement in January of 2018. Before that GM had no knowledge about the possibility of fraud --

THE COURT: You're saying that there was lightning and thunder but no rain, that they don't have a duty to act at that time and so they had to wait for the rain or the monsoon to occur?

MR. WILLIAN: No, I'm not, Your Honor. I'm not saying there was any lightning or any thunder. To the contrary, as you recognized in the *State Farm* case, we have the right to rely on the good faith presumption that the FCA and the UAW are operating at arm's length, and there's nothing in the record whatsoever to indicate that there were any storm warnings, to use your storm analogy. Put simply, there was no possibility

of fraud indicated by any of the evidence.

THE COURT: Even though you say the whole tradition of auto bargaining forever is pattern bargaining and while this was something that was contrary to the entire tradition of pattern bargaining to pick the lesser pocket rather than the deepest pocket and, therefore, there wasn't a storm warning when that occurred?

MR. WILLIAN: There was a surprise for sure, Your Honor, but it's not a storm warning indicating fraud or systematic bribery of this nature. No, sir.

THE COURT: Okay. Thank you.

MR. WILLIAN: So that's -- concludes my argument with respect to FC US LLC's -- FCA US LLC's motions to dismiss. We would ask the Court to deny that motion for the reasons stated.

THE COURT: Okay. Do you want to speak with regard to FCA N.V.? Or is your -- or is that argument subsumed already?

MR. WILLIAN: No, it has not been subsumed, Your Honor. That argument pertains to the jurisdiction of FCA N.V.

THE COURT: Yep.

MR. WILLIAN: And I can be brief here.

THE COURT: I think so. I think so.

MR. WILLIAN: Okay. I'll be very brief, Your Honor.

THE COURT: Thank you. You don't have to be very brief, but, you know, I think it doesn't play out into a long discussion, sir.

MR. WILLIAN: Yes. So FCA N.V. brought this motion on the assumption that we had only alleged or the claim that GM had only alleged that FCA N.V. had the knowledge and approval of the alleged -- or the bribery payments, and on that basis they made their motion, Your Honor. But we plainly have alleged active involvement in the bribery scheme by FCA N.V. That's detailed obviously in our briefing, so I won't go through it all in detail. But we allege very specifically that Mr. Marchionne acted as FCA N.V. CEO and that he instructed Mr. Iacobelli to engage in this bribery scheme. That scheme took place for six years. So FCA N.V. was actively directing this bribery scheme for those years.

We allege that Mr. Marchionne contacted GM directly to try to force this merging and implementing Operation Cylinder. We allege that GM turned down this proposal and then Mr. Marchionne, on behalf of FCA N.V., engaged in the scheme that he did with respect to the 2015 CBA.

So GM has alleged very specific acts by FCA N.V. It's not group pleading. Where we can identify the specific acts by FCA N.V. we did and those are active acts not passive acts, ones involving instruction and making payments, sending letters and the like. So we believe this Court clearly has jurisdiction over FCA N.V. as alleged in the complaint. Notably, this is a relatively low burden since it's being submitted to the Court on the papers.

THE COURT: Let me ask you a question. In *Anza*, A-N-Z-A, Supreme Court said the element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors which left unchecked could blur the line between RICO and the antitrust laws.

You're seeking treble damages, huge amounts of money, to -- would this be to gravely injure or destroy a competitor, one of the three U.S. automakers with tens of thousands -- more than tens of thousands of workers? And is this more appropriately not a RICO matter with treble damages but really an antitrust claim if it applies? And I'm not even going there because that's a whole nother thing. But isn't this what we're looking at here where there's three companies, domestic, and you're seeking treble damages, huge amounts of money that would severely impact FCA in their ability to continue automobile production?

MR. WILLIAN: So, first, if I could just address, *Anza*, it does not apply to this case, Your Honor. *Anza* is not a precedent that has application here because that is an indirect harm case --

THE COURT: I know. I'm just talking about the concept of a nuclear situation with regard to the impact going forward.

MR. WILLIAN: I can't predict the impacts, Your Honor. All I can say is this was a bribery scheme that lasted for years, and the whole point of the bribery scheme was to target GM and impose higher costs on it. I'm not sure exactly what all those costs are. They are significant. It's a significant case. The intent is not to destroy FCA or whatever you're suggesting. The intent is for GM to get compensated for the direct harm that it incurred from this bribery scheme.

THE COURT: Understand. Okay. Thank you, Mr. Willian.

MR. WILLIAN: Thank you.

THE COURT: Okay. At this point then we're going to -- did you want to respond to Mr. Iacobelli's counsel, Mr. Willian?

MR. WILLIAN: Yes, I can briefly respond to Mr. Iacobelli's counsel. His arguments did largely mirror FCA counsel. I will say that Mr. Iacobelli, with respect to the statute of limitations, makes the novel argument that's not supported by law. That's the statute should have begin to run pre-November of 2017 based on the circumstances of the negotiation of the 2015 CBA. There's no law that supports that. Clearly, the clock does not run until there's injury. The potential of future injury does not run the clock and we cite the *Rite Aid Corp. v. AB -- American Express Travel* case, 708 F. Supp. 2d 257 on that.

THE COURT: That's a district court case where, sir?

MR. WILLIAN: That's in the Eastern District of New York, 2010.

THE COURT: Thank you.

MR. WILLIAN: And, therefore, that argument does not hold. And with respect to his remaining statute of limitations argument, it is the same as FCA's and I've already addressed that. I think that was the only unique argument I heard from Mr. Nedelman that bears responding to you at this point, Your Honor.

THE COURT: Okay. We'll take a 15-minute break rather than a ten-minute break.

Mrs. Lizza, do you need more then 15 minutes?

THE REPORTER: No, 15 should be fine, Judge.

THE COURT: Okay. Then we will return in 15 minutes for the replies and they can be longer than 15 minutes and they probably will be. Thank you.

MR. HOLLEY: Thank you, Your Honor.

(Court in recess, 11:45 a.m. to 12:00 p.m.)

THE LAW CLERK: Court is back in session.

THE COURT: Then please proceed on behalf of FCA.

MR. HOLLEY: Yes, Your Honor.

THE COURT: And I'm not going to hold it to 15 because I think, again, we've raised issues and there are certainly a lot of complicated issues and so, you know, we're not going to

just stop at 15 and close the --

MR. HOLLEY: Okay.

THE COURT: -- hearing. Thank you.

MR. HOLLEY: I appreciate that, Your Honor. I'm going to try to be brief nonetheless.

In terms of but-for causation, Mr. Willian said that the defendants have made criminal admissions. I just want to make it very clear that neither the FCA US LLC nor FCA N.V. have made any criminal admissions. Neither corporation has admitted to doing anything wrong in connection with the alleged prohibited payments.

And Mr. Willian said I think at least three times that the whole point of the alleged bribery scheme was to harm General Motors by imposing higher labor costs on it. But I think we need to do a reality check with regard to that assertion because GM's entire case is predicated on indictments, plea agreements and sentencing memoranda in cases with which the Court is familiar and there is no mention of General Motors in any of those documents. So how plausible can it be that GM was the target of this behavior when nobody is talking about General Motors?

If you look at what the Justice Department says -- and I'm not agreeing with this, I'm just saying what they say -- they say that the point of these alleged prohibited payments was to create labor peace and to grease the skids in

negotiations between the UAW and the FCA. If that's right, and, again, I don't agree with it, that has nothing to do with General Motors. That has to do with the UAW and FCA. And if GM is a proper RICO plaintiff in this case, then so is Ford and so is every other automaker in North America that has unionized workers. And the reason why is because the flip side of giving a sweetheart deal to FCA is that you don't give that deal to everybody else.

So if FCA corruptly got lower labor costs, that didn't just hurt General Motors; it hurt Ford, it hurt everyone. So you can't have it that only GM is affected by this. And it's pure semantics to say, oh, this didn't -- you know, this really wasn't something that benefited FCA workers or hurt the FCA workers. It was all directed at General Motors.

THE COURT: Well, if I may respond, might they say, yeah, others could bring cases but let's focus on our case, we're dealing with specifically GM?

MR. HOLLEY: Yes, Your Honor. But that just goes to show that under *Holmes* they are not a proper plaintiff because there are other more directly harmed people who have already brought suit, namely, the rank and file members of the United Auto Workers. The NLRB has brought suit on behalf of -- you know, enforcing the federal labor laws. And in order to try to allocate damages if GM is one of, I don't know, you know, tens of potential plaintiffs is precisely the sort of thing that the

Supreme Court in *Holmes* said is the rationale for saying only the most directly injured party may sue and that you're not supposed to go beyond the first step in the chain of causation.

So I think when Mr. Willian -- I was a little surprised, but when he said in response to your question that Ford might have a claim, that seems to me to prove our point which is that, you know, under GM's view of the world, half of Detroit, frankly, Chattanooga, Tennessee and other places all have claims based on these alleged prohibited payments. Mr. Willian spent a lot of time talking about Mr. Marchionne's comments.

I encourage the Court to actually look at the video that is linked at paragraph 64 of the complaint on page 59. I actually think this link is broken, but I don't think Mr. Willian would mind if I sent the Court a link that works. But what Mr. Marchionne is talking about is two things. First, he says that the 2015 collective bargaining agreement, by reducing the disparity between tier one and tier two workers, has solved an issue of making it more appealing for young people to come into the auto industry, solving the labor problem. And then he says that he's going to turn his attention to the capital problem which is, as Your Honor pointed out, has been a focus or was a focus of his for years and years because he believed that there were too many car companies with too many different models that were enormously

expensive. And there's a whole slide presentation on the internet called Confessions of a Capital Junkie from April of 2015 where he sets out his views.

The notion that that statement is an admission of a scheme designed to hurt General Motors I do not understand. I mean it's a country mile from that. He's talking about the capital structure of the auto industry.

It's also wrong to say that the *Bridge* case and the *Empress Casino* case helped General Motors on the issue of proximate cause. Those are both quite unique cases based on their facts and they have no application here. In *Bridge*, there were these auctions for tax liens and there was so much demand for the tax liens that they were assigned on a rotational basis. And the defendant jimmied with that rotational system and unfairly got more of the tax liens than it should have gotten. And the only party injured was the competing bidder who unfairly was cheated out of liens they should have gotten. The county that was selling the tax liens got the same amount of money because, you know, it was just -- they didn't care who bought them, they just got the money. So there the disappointed bidder is the only injured party, the most directly injured party, and it makes sense to say that they have standing under RICO.

And in *Empress Casino*, the governor of Illinois was bribed to create a system where the five casino owners in the

state had to pay a percentage of their profits into a fund for the benefit of the horse racing industry. The people who were injured were easy to identify; it was the five casino owners who had to pay money into this corruptly created fund.

This is very, very different, and I have to disagree with Mr. Willian. Trying to trace the alleged injury here either before 2015 or after 2015 is not an accounting exercise. You have to go -- as Mr. Nedelman pointed out, you have to go through a game theory exercise to figure out what would the collective bargaining agreements between the UAW and FCA and the UAW and GM have looked like in the but-for world and then tried to figure out what portion of the differential in that hypothetical construct was attributable somehow to the alleged prohibited payments. That is a very, very complex exercise, Your Honor, exactly the sort of thing that the Supreme Court in *Holmes* was saying is a reason for this direct injury requirement.

And Mr. Willian said several times, and I just want -- I think the Court picked up on this, but he said that what FCA did was to try to gain a competitive advantage vis-a-vis General Motors. That really kind of points up the fact that this is precisely the sort of case by an economic competitor that the Supreme Court said courts should be cautious of because they bore the distinction between RICO claims and antitrust claims. If GM thinks that they have some sort of

unfair competition claim against FCA that is actionable under the Sherman Act, that's the case they should have brought not this case.

So, Your Honor, turning to the FCA N.V. motion to dismiss very briefly, Your Honor. Mr. Willian said that there are specific allegations in the complaint about conduct that was actively engaged in by FCA N.V. With respect, Your Honor, I don't believe that's accurate. I read the three paragraphs where FCA N.V. is mentioned and they don't say they did anything [indiscernible]. So that means that GM is relying on the behavior engaged in by Mr. Marchionne who was, as we know, the CEO of both FCA N.V. and FCA US. But Mr. Willian didn't mention and there's no answer to our point that the Supreme Court's decision in the *Bestfoods* case says quite clearly that the presumption is in these circumstances that Mr. Marchionne was acting wearing his FCA US hat. If he was talking to Mr. Iacobelli who worked for FCA US, he was talking to him in his capacity as the CEO of the U.S. operating subsidiary not in his capacity as the CEO of a holding company in the Netherlands.

So, Your Honor, those were the points I wanted to make. Obviously if Your Honor has questions, I would be happy to answer them.

THE COURT: No. Thank you.

Okay. Mr. Nedelman.

MR. NEDELMAN: Thank you. Thank you, Your Honor.

I will also try and keep my comments reasonably brief because we have set forth our positions I think fairly comprehensively in our papers.

It appears though what GM is really upset about is that they're upset with the implementation of the UAW of a contractual relationship or two, 2011 to the 2015, that General Motors entered into voluntarily, and their remedy under those circumstances, if there was any impropriety in the course of negotiations or the implementation of the contract, was to seek -- to file an unfair labor practice charge before the NLRB. GM hasn't done that. GM has gone out of its way to, in its papers, to not focus on the UAW when, in fact, it's the UAW's conduct that General Motors complains about.

General Motors also in its papers and in Mr. Willian's statements to the Court tries to blur -- actually Mr. Iacobelli has admitted seeking advantages for the benefit of FCA. There's no question about that. General Motors has attempted throughout its complaint and its argument this morning to add to Mr. Iacobelli's admissions, which addition doesn't exist, that it was to harm General Motors. And as Mr. Holley indicated, there is nothing in the record that points to any conduct intended to harm General Motors as opposed to conduct that has admittedly been undertaken to benefit FCA.

There is -- when I look at General Motor's complaint,

particularly paragraphs 125 to 135, those are the storm warnings. General Motors describes the very conduct that should have under existing case law alerted it and, in particular, the allegations at complaint paragraph 132. When the Court looks at paragraph 132, I trust the Court will see that General Motors conducted its own analysis, concluded it was going to be harmed, concluded it suffered injury and it draws its -- General Motors' reliance on the pattern bargaining concepts into clear focus. GM --

THE COURT: In what year are you directing us to in terms of GM's situation right then?

MR. NEDELMAN: Well, certainly the 2015 contract because in paragraph 132 of the complaint General Motors acknowledges that it conducted its own analysis of the FCA-UAW contract and concluded that it was forecast to cost GM more than double what it anticipated.

That analysis, that understanding dovetails into the crux of General Motors' complaint which is it claims to be bound by the construct of the pattern bargaining, and yet it doesn't want to be bound by its own knowledge of the consequence of the very thing it relies on. And I don't think General Motors can have it both ways. If it was the beneficiary of those negotiations, if it was expecting to follow them, if it understood the effect. I mean if all of what General Motors alleges is true and excepting for these

purposes that it was bound to the pattern bargaining, then it also knew when FCA entered into the 2015 contract in October of 2015 --

THE COURT: Which is more than four years before the complaint, that's what you're getting at.

MR. NEDELMAN: Correct. And it knew it had suffered injury and the statute of limitations had expired by the time it filed suit in November of 2019. I can also take issue with General Motor's assertion that the damage calculation is somehow simple. As I indicated earlier, the machinations that the Court would have to go through to hypothetically engage in labor negotiations and then determine what that outcome would have been, determined what the membership would have agreed to, it's impossible, truly impossible to measure whatever General Motors believes its damages were because there is no baseline against which to measure them. Certainly can't be measured against GM's expectations. And so there is no measurement by which this Court could engage in as the trier of fact and, as a consequence, the damages are purely speculative.

With that, Your Honor, if you have any questions, I'm happy to answer them.

THE COURT: No, I don't. But right now I'm going to issue an order with regard to this case that will be entered after I read it.

"I'm taking this case under advisement and,

if necessary, of course, I will be prepared to rule.

But because today, like every day now, is not an ordinary day, I'm entering this order.

The world has changed dramatically since this case was filed on November 20th, 2019. This city, this state and this country need healing.

The COVID-19 pandemic and its impact on the health of this country requires our attention here and now.

Just as important is our response to the tragic death of George Floyd that has brought to the forefront the long-standing issues of racial discrimination and social justice that require our attention and solution here and now.

If this case goes forward, there will be years of contentious litigation, motion hearings, multiple-day depositions of large numbers of key executives and former executives at GM and FCA, as well as UAW officials and other defendants and many third parties and a plethora of RICO, labor

law and damages experts.

These legalities will not only divert and consume the attention of key GM and FCA executives from their day jobs, issues of vehicle production, sales, worker safety, rollouts, supplier issues, et cetera, but also prevent them from fully providing their vision in leadership on this country's most pressing social justice and health issues." And I mean directly not through committees that they may set up.

"In 2008, and going forward, the federal government focused on rescuing GM and Chrysler by providing billions of dollars in aid. That saved GM and Chrysler, now FCA, and tens and tens of thousands of UAW auto workers' jobs. Today our country needs and deserves that these now-healthy great companies pay us back by also focusing on rescuing this country and its citizens from the plagues of COVID-19, racism and injustice while building the best motor vehicles in the world.

While watching television news recently, I have seen CEOs and Mary Barra of GM and

Michael Manley of FCA join together, time and again, often with Bill Ford, to provide some attention, leadership and skills to solving social and economic issues for the good of their companies, their workers, their communities and our country. So, too, I have noticed some attorneys devoting their skills to provide equal justice for all citizens, in particular, those less fortunate who require representation in our courts.

What a waste of time and resources now and for the years to come in this mega litigation if these automotive leaders and their large teams of lawyers are required to focus significant time-consuming efforts to pursue this nuclear option lawsuit if it goes forward.

I am ordering that no later than July 1st, just the two CEOs, Mary Barra and Michael Manley, meet in person with social distancing to explore and, indeed, reach a sensible resolution of this huge legal distraction. This will enable these two gifted individuals and their companies to

fully concentrate, in addition to their day jobs, on providing the leadership and vision this country requires and deserves in solving the aforementioned critical issues. Time is of the essence. So, I repeat; Mary Barra and Michael Manley, meet face to face in good faith and with goodwill to resolve this huge legal diversion, to permit you and your companies to also fully focus your talents on healing this country as we all embark on the critical road ahead.

I request that I hear from just both of you personally on a Zoom or teleconference, no need for both to again be present physically in the same room, at noon, July 1st, 2020, to provide me with the results of your important discussions.

Thank you for attention to this order.

So ordered, Paul D. Borman, U.S. District Judge, June 23rd, 2020."

Thank you. We are concluded.

MR. WILLIAN: Thank you, Your Honor.

MR. HOLLEY: Thank you, Your Honor.

(Proceedings concluded, 12:23 p.m.)

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CERTIFICATION OF REPORTER

I, Leann S. Lizza, do hereby certify that the above-entitled matter was taken before me remotely at the time and place hereinbefore set forth; that the proceedings were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party, nor interested in the event of this cause.

S/Leann S. Lizza 6-25-2020

Leann S. Lizza, CSR-3746, RPR, CRR, RMR, RDR Date